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IN THE

Supreme Court of the United States

No. 224

LONNIE KEAHEY,
PETITIONER,

VS.

THE STATE OF TEXAS,
RESPONDENT.

Petition for Re-hearing of Application for Writ of Certiorari

FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

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FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

After this cause was decided by said Court of Criminal Appeals of the State of Texas, a Motion for Re-Hearing was filed by your Petitioner, which Motion for Re-Hearing was overruled by said Court of Criminal Appeals of Texas on the 6th day of May, 1959 (Tr. of R, p. 165) without written opinion. Thereafter, your Petitioner filed in said Court of Criminal Appeals of the State of Texas Appellant's Second Motion for Re-Hearing on the 8th day of May, 1959. (Tr. of R, p. 166) and attached thereto was an Application for Permission to File Appellant's Second Motion for Re-Hearing which was denied by said Court of Criminal Appeals on the 8th day of May, 1959 (Tr. of R., 167) without written opinion.

The errors assigned in this Application for Writ of Certiorari were assigned and complained of by Petitioner in the Court of Criminal Appeals upon said Motion for Re-Hearing and upon the Second Motion for Re-Hearing in the Court of Criminal Appeals. (Tr. of R, pp. 155 to 168).

STATEMENT OF THE NATURE AND RESULT OF THE CASE

This case was instituted against Petitioner by The State of Texas upon complaint and information filed against him in County Court at Law No. 3 of Bexar County, Texas, upon a charge of Unlawful Practice of Medicine (Tr. of R, pp. 4-7). A trial was had before a jury and Petitioner was convicted of the illegal practice of medicine, and assessed a penalty of 30 days in jail and a $500.00 fine (Tr. of R, p. 15). Your Petitioner filed, in due time, a Motion for a New Trial, assigning various errors of the Trial Court (Tr. of R, pp. 21 and 22). That thereafter, your Petitioner filed an Amended Motion for a New Trial, and requested, in connection therewith, permission to file said Amended Motion for New Trial (Tr. of R, pp. 23 to 32). To this Amended Motion for New Trial (Tr. of R, pp. 23 to 32), was attached Exhibit A (Tr. of R, p. 31, showing that the Naturopathic Law was still in full force and effect on the 7th day of December, 1957, the date of the filing of the complaint and information hereinabove referred to on the 2nd day of December, 1957.

There was also raised in paragraph 6 of said Amended Motion for New Trial (Tr. of R, p. 29)

calling into question in the Trial Court the discrimination between the citizens of Texas and of Petitioner herein, and the citizens of the District of Columbia as set forth in said paragraph.

The Trial Court having overruled and not considering Petitioner's Amended Motion for New Trial, the Petitioner, in due time, appealed to the Court of Criminal Appeals of the State of Texas, the Court of last resort in criminal cases in the State of Texas, and presented in his Brief before the Court of Criminal Appeals various questions of law as reflected therein (Tr. of R, pp. 125 to 134). That thereafter, the said Court of Criminal Appeals issued an Opinion Affirmance of said cause (Tr. of R, pp. 152 to 153) in which said Court wholly ignored the various propositions of law raised by your Petitioner — Appellant in said Court — and refused to express an opinion thereon, and refused to pass upon the question raised by your Petitioner — Appellant in the Court below — wherein complaint was made of the refusal of the Trial Court to permit the filing of Appellant's Amended Motion for New Trial, and wholly refused to express any opinion thereon.

That thereafter, Petitioner — Appellant — filed his Motion for Re-Hearing before said Court of Criminal Appeals, which was by said Court of Criminal Appeals overruled without written opinion (Tr. of R, pp. 155 to 164; and thereafter, your Petitioner, within two days from the date of overruling, by said Court of Criminal Appeals, of said Motion for Re-Hearing, filed a Second Motion for Re-Hearing (Tr. of R, p. 168-169) and attached thereto an Application for

Permission to File Appellant's Second Motion for Re-Hearing, (Tr. of R, p. 167), which was denied by said Court of Criminal Appeals on the 8th day of May, 1959 (Tr. of R, p. 167) without written opinion.

STATEMENT OF JURISDICTION

The Supreme Court of United States has jurisdiction to grant a Writ of Certiorari in this cause because the Court of Criminal Appeals of Texas, the Court of last resort in the State of Texas in criminal cases, has deprived a citizen of the United States of due process of law, as guaranteed by the 5th Amendment to the Constitution of the United States, and which question was brought before the Court of Criminal Appeals of the State of Texas, upon Appellant's — Petitioner's — Second Motion for Re-Hearing (Tr. of R, p. 166, paragraph 2).

Another error raised before the Court of Criminal Appeals, below, was the question that by arbitrary action of said Court of Criminal Appeals, your Petitioner has been denied equal protection of the laws and constitution of the United States, in violation of Section 2 of Article IV of said Constitution, which reads as follows:

> "The citizens of each State, shall be entitled to all the Privileges and Immunities of citizens in the several states," (Tr. of R, p. 168, paragraph 1).

The Supreme Court of the United States has jurisdiction in this cause under Part V, Jurisdiction on Writ

of Certiorari, Revised Rules of the Supreme Court of the United States, Rule 19, paragraph (a) which reads as follows:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Petitioner further says that the Supreme Court of the United States has jurisdiction under paragraph (b) of said Rule 19, which reads, in part, as follows:

> "or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The date of the judgment sought to be reviewed is February 25, 1959 (Tr. of R, pp. 152 and 153); the date of the overruling, without written opinion, of Appellant's Motion for Re-Hearing, is May 6, 1959 (Tr. of R, pp. 164 and 165); the date of overruling and refusing to consider Appellant's Second Motion for Re-Hearing is May 8, 1959 (Tr. of R, pp. 166 and 167).

The date o the order by the Court of Criminal Appeals of Texas with reference to Petitioner's Application for Stay of Mandate in the Court of Criminal Appeals of Texas is May 8, 1959 (Tr. of R, p. 173).

There is attached to the Record of the Transcript a certificate by the Clerk of the Court of Criminal Appeals of the State of Texas, to the effect that the

Court of Criminal Appeals of Texas is the Court of last resort in criminal cases, and that the judgment has become final on the docket of said court (Tr. of R, p. 174). (A copy of the opinion of the Court of Criminal Appeals is hereto attached and Marked Appendix "A" for identification and made a part hereof, as provided for in Section (j) of Rule 23 of the Supreme Court of the United States.)

STATEMENT AND ARGUMENT

In view of the fact that this Honorable Court did not file a written opinion or reason why this Application for Writ of Certiorari was denied by this Honorable Court on the 12th day of October, Counsel for Petitioner is at a disadvantage in the preparation of this, his Petition for a Re-Hearing, inasmuch as Counsel does not know upon which point said Application for Writ of Certiorari was denied, and therefore, it will be necessary to re-state the points raised in said application and to fully cite the cases referred to in Chapter 28, Section 236 of Erisman's Rules of Reversible Errors, which reads as follows: "The burden of proof is upon the State to establish by legal and competent evidence, beyond a reasonable doubt, every material element of the offense charged against the accused."

POINT OF ERROR NUMBER ONE

The Court of Criminal Appeals arbitrarily and in violation of Petitioner's rights refused to follow the settled rule of law that "The burden of proof is upon

the State to establish by legal and competent evidence, beyond a reasonable doubt, every material element of the offense charged against the accused."

This is in direct conflict with the Constitutional provisions contained in Section 2 of Article IV of the United States Constitution which reads as follows: "The citizen of each State shall be entitled to all the privileges and immunities of citizens in the several states."

The complaint in this case alleged, among other things, that Petitioner (Appellant in the Court below) "in the County of Bexar, and State of Texas, Lonnie Keahey did then and there unlawfully practice medicine," etc. It was encumbent upon the State to prove that allegation, it being a material allegation. The state wholly failed to prove that Petitioner (Appellant) was a resident of Bexar County, Texas (see Tr. p. 42, et seq, being the Statement of Facts in the case). No witness testified as to the residence of Petitioner. Petitioner did not take the stand, and absolutely no proof was given as to his residence in Bexar County.

Article 739 of the Penal Code of Texas provides "It shall be unlawful for anyone to practice medicine . . . who has not registered in the District Clerk's Office of every County in which he may reside and in each County in which he maintains an office . . . the certificate evidencing his right to practice", etc.

It was, also, encumbent upon the State to prove, under the allegations of the complaint, (see Tr. p. 2), that Petitioner maintained an office in said County (Bexar) "in which defendant then and there resided,

and being the County in which he then and there maintained an office and designated a place for meeting", etc. (See Tr. p. 2).

Both of said allegations were material allegations and it was necessary for the State to prove each allegation beyond a reasonable doubt as set forth in the rule laid down by Erisman and quoted hereinabove.

In support of the above proposition of law, we cite the following authorities:

Miller Vs. State, 256 S.W. 2d, 856;
Smith Vs. State, 243 S.W. 2d, 833;
Brinkley Vs. State, 228 S.W. 2d, 522;
Johnson Vs. State, 207 S.W. 2d, 871;
Duckett Vs. State, 191 S.W. 2d, 879;
Graham Vs. State, 134 S.W. 2d, 122;
Hepworth Vs. State, 120 S.W. 2d, 250;

and numerous other decisions set out on page 158 of the Transcript of Record herein filed.

It was specifically pointed out in said Motion for Re-Hearing before the Court of Criminal Appeals of Texas that there was and is no testimony showing that Appellant — Petitioner — lived and resided in Bexar County, Texas, which was a necessary averment to the complaint and information in this cause, and such facts should have been proved in support of the State's case, because Article 739 of the Penal Code provides:

> "It shall be unlawful for any one to practice medicine . . . within the limits of this State who has not registered in the District Clerk's office of every County in which he may **reside**, and in each and every County **in which he maintains an office**" (see Tr. of R. p. 157 in its entirety).

We think that the action upon the part of the Court of Criminal Appeals in failing and refusing to pass upon such question, and failing and refusing to consider same at all, comes squarely under Article IV, Section 2, of the Constitution of the United States which reads as follows: "The citizens of each State, shall be entitled to all the Privileges and Immunities of citizens in the several states" and comes squarely within the provisions of the 5th Amendment to the United States Constitution wherein it is provided

> ". . . nor be deprived of life, liberty or property without due process of law."

Now, if the Court of Criminal Appeals had heretofore, by an unbroken line of decisions, established the rule and enforced the rule of law laid down by Judge Erisman, that is:

> **"The burden of proof is upon the State to establish by legal and competent evidence beyond a reasonable doubt every material element of the offense charged against the accused,"**

we say that in refusing to apply the same rule of law to your Petitioner—Appellant in the Court below—and arbitrarily refusing to pass upon said question as raised by Motion for Re-Hearing and by Second Motion for Re-Hearing (Tr. of R, pp. 155 to 166, inc.) the said Court of Criminal Appeals has deprived your Petitioner of due process of law as guaranteed by the 5th Amendment to the Constitution of the United States and has discriminated against your Petitioner, in violation of Article IV, Section 2, of the Constitution of the United States.

There was and is nothing in the entire record of this case to show that defendant resided in Bexar

County, Texas — the County of prosecution — and there was nothing to show that he maintained an office in said Bexar County, Texas, as provided for in Article 739 of the Penal Code hereinabove quoted.

For the reasons hereinabove set out your Petitioner respectfully requests this Honorable Court to grant this, his Application for a Writ of Certiorari herein, to the end that the entire record of this cause may be brought before this Court and the errors herein complained of be corrected to the end that your Petitioner may be accorded his rights guaranteed under the laws and Constitution of the United States and of the State of Texas.

Counsel for Petitioner herein certifies to this Honorable Court that this Petition for Re-Hearing of said Application for Writ of Certiorari is presented in good faith and is not made for delay.

Respectfully submitted,

Grover C. Morris

GROVER C. MORRIS,
201 Houston Building,
San Antonio, Texas,
Attorney for Petitioner.

Joseph W. Burkett

JOSEPH W. BURKETT,
622 Brady Building,
San Antonio, Texas,
Of Counsel.

CERTIFICATE OF GOOD FAITH

I, Grover C. Morris, Attorney for Petitioner, Lonnie Keahey, do hereby certify, in compliance with Rule 58, Section 2, of the Supreme Court of the United States, that said Petition for Re-hearing of the application for Writ of Certiorari, in cause No. 224, LONNIE KEAHEY, Petitioner, vs. THE STATE OF TEXAS, Respondent, is presented in good faith and not for delay, and also certify that such Petition for Re-hearing is restricted to the grounds specified therein.

Respectfully Submitted,
GROVER C. MORRIS
Attorney at Law
Houston Bldg., San Antonio, Tex

GROVER C. MORRIS,
201 Houston Bldg.,
San Antonio, Texas
Attorney for Petitioner.

I, Will Wilson, Attorney General of the State of Texas, hereby acknowledge receipt of a printed copy of Petitioner's Application for Writ of Certiorari in this case this the 30th day of October, 1959.

/s/ Will Wilson

WILL WILSON,
Attorney General of the State of Texas,
Austin, Texas,
Attorney for Respondent.

By: /s/ Morgan Nesbitt
Assistant Attorney General

APPENDIX A

Lonnie Keahey, Appellant
No. 30,452. v.
The State of Texas, Appellee } Appeal from Bexar County

OPINION

The offense is the unlawful practice of medicine; the punishment, 30 days in jail and a fine of $500.00.

Officer Rosas of the San Antonio police testified that on the day in question he was engaged in investigating the unlawful practice of medicine; that he presented himself at the appellant's office, saw a sign reading "Lonnie Keahey, N. D."; that as he entered the appellant, who was dressed in a white coat, identified himself as Dr. Keahey, asked him what his trouble was; that he told the appellant he was having pains in his stomach; that the appellant told him he believed it was caused by stomach gases, directed him to be seated, mixed a potion from two jugs which were on a shelf and gave it to him to drink, along with two pills. At the conclusion of the treatment, the appellant told him that his charges for such services were $4.00, gave him a bottle of liquid on which he pasted a label containing instructions for taking, and told him to return within a week if he was not improved.

It was established that appellant had not registered as a medical doctor.

Pressy Castillo testified that a short time prior to the day charged in the information her mother took her to the appellant for treatment, that he gave her a shot and some pills to take, and that some three weeks thereafter she had an infection on her lip and again

went to the appellant, that he again gave her a shot and some medicine, and that she paid him his $3.00 fee on each visit.

The appellant did not testify or offer any evidence in his own behalf.

We shall discuss the contentions advanced in the appellant's brief and argument.

Appellant contends that the evidence is insufficient to support the conviction because there is no showing that Rosas was actually ill, no showing as to what the fluid was that the appellant gave Rosas to drink or the contents of the pills which he gave him to swallow, and no showing that the appellant ever told the witness Castillo that he was a doctor. Appellant cites no authority to support such contention, nor are we awafe of any.

He next complains of the Court's charge. There were no objections to the court's charge, and the requested charge did not call the court's attention to the defect in the charge which the appellant now asserts.

He complains of the refusal of the trial court to consider his amended motion for new trial in which he alleged that he was not permitted to prove that he was a licensed naturopath. Appellant overlooks the holding of this Court in De Hay v. State, 254 S.W. 2d, 513, that such proof is immaterial to any issue in a case of this nature and does not constitute a defense.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Presiding Judge

(Delivered February 25, 1959)

ppendix A